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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

November 19, 2002

EX PARTE

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: *Ex Parte* Presentation
CC Docket No. 02-33

Dear Ms. Dortch

On November 18, 2002, Steven Teplitz, Vice President and Associate General Counsel, AOL Time Warner Inc. ("AOL"), Donna N. Lampert and the undersigned, both of Lampert and O'Connor, P.C., met with John Rogovin, Linda Kinney, Jim Carr, Andrea Keamey and Chris Killion, of the Office of General Counsel, to discuss the above-referenced docket.

In the meeting, consistent with AOL's Comments and Reply Comments filed on May 3, 2002 and July 1, 2002 respectively in CC Docket No. 02-33; we discussed the following points.

We explained first that clear precedent establishes that wholesale DSL is a telecommunications service subject to Title II regulation, whether provided to BOC-affiliated ISPs or to unaffiliated ISPs. The Commission has repeatedly found that wholesale DSL services are telecommunications services. In this regard, we provided the attached handout that lists some of the Commission's precedent establishing that wholesale DSL is a telecommunications service as well as some of the cases where the courts have relied on that precedent. Further, we explained that the Commission cannot ignore the fact that wholesale DSL services are squarely within the *NARUC* Iprecedent. We emphasized that the Commission must recognize that this is not merely an issue of semantics; there are millions of consumers that will be affected if they can no longer be assured that their JSP will be able to obtain DSL services on a transparent and nondiscriminatory basis.

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Second, we stated that regardless of the regulatory classification of DSL transmission used by BOC-affiliated ISPs, the Commission must maintain the *Computer Inquiry* safeguards relied on by unaffiliated ISPs.¹ We urged the Commission to provide explicit guidance maintaining the requirements that BOCs unbundle the underlying transmission component and make it available to unaffiliated ISPs on the same rates, terms and conditions that the BOC provides itself. We also emphasized that the Commission must ensure transparency in order to deter anticompetitive behavior and to enhance enforcement.

Pursuant to Section 1.1206(b) of the Commission's rules, two copies of this letter and the attachment are being provided to you for inclusion in the public record in the above-captioned proceeding. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Linda L. Kent

Counsel for AOL Time Warner Inc.

Attachment

cc: John Rogovin
Linda Kinney
Jim Carr
Andrea Keamey
Chris Killion

¹ In our discussion of Commission authority, we referenced the following FCC decisions and court cases: *Implementation of Sections 255 and 251(a)(2) of the Communications Act*, Report and Order and Further Notice of Inquiry, 16 FCC Red. 6417, ¶ 95 (1995); *Southwestern Bell Tel. Co. v. FCC*, 19 F. 3d 1475, 1483 (1994); *North American Telecom. Ass'n v. FCC*, 772 F. 2d 1282, 1292 (7th Cir. 1985); *Second Computer Inquiry*, Memorandum Opinion and Order, 84 FCC 2d. 50, ¶ 123 (1980); *GTE Service Corp. v. FCC*, 474 F. 2d 724, 730-731 (2nd Cir. 1973); and, *Philadelphia Television Broadcasting v. FCC*, 359 F. 2d 282, 284 (D.C. Cir. 1966).

**CLEAR PRECEDENT ESTABLISHES THAT WHOLESALE DSL IS A
“TELECOMMUNICATIONS SERVICE”**

FCC Orders:

- In 2001 *CPE/Enhanced Services Unbundling Order*, the FCC held DSL services are subject to Title II of the Act:

“The internet service providers require ADSL service to offer competitive internet access service. We take this issue seriously, and note that all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers. . . . In addition, we would view any such discrimination in pricing, terms, or conditions that favor one competitive enhanced service provider over another or the carrier, itself, to be an unreasonable practice under section 201(b) of the Act.”

Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order, 16 FCC Rcd 7418, ¶ 46 (2001).

- The FCC’s 1999 Advanced Services Second *R&O* held that:

“...bulk DSL services sold to Internet Service Providers . . . are telecommunications services, and as such, incumbent LECs must continue to comply with basic common carrier obligations with respect to these services.”

Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order, 14 FCC Rcd. 19237, ¶ 21 (1999).

- The FCC’s 1998 Advanced Services *MO&O* held that advanced services offered by incumbent LECs, including DSL:

“...are telecommunications services... To the extent that an advanced service does no more than transport information of the user’s choosing between or among user-specified points, without change in the form or content of the information as sent and received, it is ‘telecommunications,’ as defined by the Act. Moreover, to the extent that such a service is offered for a fee directly to the public, it is a ‘telecommunications service.’”

The Advanced Services *MO&O* also held that:

“Incumbent LECs have proposed, and are currently offering, a variety of services in which they use xDSL technology and packet switching to provide members of the public with a transparent, unenhanced, transmission path. Neither the petitioners, nor any commenter, disagree with our conclusion that a carrier offering such a service is offering a ‘telecommunications service’... BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services.”

Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, 13 FCC Rcd. 24011, ¶¶ 35-37 (1998).

- In the *GTE DSL* Order, the FCC correctly concluded that:

"GTE's ADSL service is a special access service, thus warranting federal regulation. . ."

"The Commission previously has distinguished between the 'telecommunications services component' and the 'information services component' of end-to-end Internet access"

"We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable," citing 47 U.S.C. §§ 204-205.

GTE Telephone Operating Cos., Memorandum Opinion and Order, CC Docket 98-79, 13 FCC Rcd. 22466, ¶¶ 25, 20, n. 111 (1998).

- In FCC's 1999 CALEA order, FCC stated:

"digital subscriber line (DSL) services are generally offered as tariffed telecommunications services, and therefore subject to CALEA, even though the DSL offering would be used in the provision of an information service."

Communications Assistance for Law Enforcement, Second Report and Order, 15 FCC Rcd. 7105, 7120 (1999).

- FCC has frequently explained in Section 214 discontinuance proceedings that carrier discontinuance (including nondominant carriers) of DSL services entails Title II obligations.

Sprint proposes "to discontinue Sprint Business DSL, a domestic telecommunications service"

"Comments Invited on Sprint Communications Company L.P. Application to Discontinue Domestic Telecommunications Service," FCC Public Notice, DA 02-2600 (rel. Oct. 9, 2002).

DSL telecommunications services to be discontinued by Rhythms Link are subject to Title II discontinuance process.

Rhythms Links Inc. Section 63.71 Application to Discontinue Domestic Telecommunications Services, Order, 16 FCC Rcd. 17024, 17025 (CCB 2001).

Courts Have Relied on FCC's Several Orders:

- The 2001, DC Circuit's *ASCENT I* noted that:

"The Commission determined that advanced services are telecommunications services like any others...As the Commission concedes, Congress did not treat advanced services differently from other telecommunications services..."

ASCENT v. FCC, 235 F.3d 662, 664 (D.C. Cir. 2001).

- In 2002, two dissenting Supreme Court Justices in *NCTA v. Gulf Power Co.* explained:

"Notably, when high-speed Internet access is provided over phone lines, in what is generally known as DSL service, the FCC has classified the first step of this process as involving the provision of a telecommunications service."

NCTA v. Gulf Power Co., 534 U.S. 327, 353 n. 4 (2002) (dissenting opinion of J. Thomas and J. Souter)